IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

THURSDAY, THE 1ST MARCH 2007 / 10TH PHALGUNA 1928

Crl.MC.No. 261 of 2007()

CRRP.40/2004 of SESSIONS COURT, KASARAGOD
MC.74/1998 of S.D.M. KASARAGODE AT KANHANGAD

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PETITIONER: REVISION PETITIONER/COUNTER PETITIONER

BABU M.MATHEW, S/O.MATHEW,
KANAGAPALLY, BALAL VILLAGE,
HOSDURG TALUK.

BY ADV. SRI.SUBHASH CYRIAC

RESPONDENTS: RESPONDENTS/PETITIONER

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1. P.C.POULOSE, S/O. CHACKO,
KANAGAKAPALLY, BALAL VILLAGE,
HOSDURG.

2. STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SRI.S.U. NAZAR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 01/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.M.C.NO. 261 OF 2007

Dated this the 1st day of March, 2007

ORDER

The petitioner claims to be aggrieved by Annexure-8 order passed under Sec.138 of the Cr.P.C. Proceedings initiated against the petitioner under Chapter-XB of the Cr.P.C. came to its final conclusion by the said order – Annexure-8.

2. The allegation against the petitioner was that he had blocked a public pathway leading to the house of the 1st respondent. A conditional order was passed by the Sub Divisional Magistrate. The petitioner entered appearance before the Sub Divisional Magistrate and denied the existence of public right in respect of the pathway which was allegedly obstructed. The Sub Divisional Magistrate thereupon proceeded to hold an enquiry under Sec.137 of the Cr.P.C. After such enquiry, the Sub Divisional Magistrate considered the materials before him and came to the conclusion that there is no reliable evidence in support of the denial of the existence of such public right in respect of the pathway. That

order passed by the Sub Divisional Magistrate under Sec.137(2) of the Cr.P.C. was challenged before the learned Sessions Judge in revision and the learned Sessions Judge by order dated 7/8/02 in Crl.R.P.No.47/98 turned down the said challenge. Thus, the order under Sec.137 of the Cr.P.C. has now become final.

3. The Sub Divisional Magistrate proceeded with the enquiry under Sec.138 of the Cr.P.C. The fact that the pathway was obstructed was not seriously disputed and the assertion was that there is no right for the 1st respondent to use any such pathway or public pathway. After recording evidence, the Sub Divisional Magistrate proceeded to pass Annexure-8 order confirming that there has been obstruction and the same requires to be removed. That order was challenged and the learned Sessions Judge in revision passed Annexure-9 order turning down the challenge.

4. The petitioner claims to be aggrieved by Annexure-8 and 9 orders. What is his grievance? He contends that really the pathway is not a public pathway; but only a private pathway. The petitioner cannot be heard to advance that contention at this

stage when the order in Crl.R.P.No.47/98 has become final. It will be apposite in this context to refer to Sec.137(3) of the Cr.P.C. below:

> "137. **Procedure where existence of public right is denied**.--
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> (1) x x x x x x x x x
>
> (2) x x x x x x x x x
>
> (3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial."

5. Here is a case where the petitioner had suffered an adverse order under Sec.137(2) of the Cr.P.C. He did challenge the order in revision; but was unsuccessful. He did not choose to challenge the order in revision by any method known to law. In these circumstances, he cannot be permitted to challenge the

said finding at the subsequent stage of the proceeding as the same has already become final. The first contention raised that the pathway is not a public pathway cannot, in these circumstances, be even considered by this Court. The learned counsel for the petitioner makes an attempt to show that the earlier finding under Sec.137 of the Cr.P.C. which has been confirmed by the court of revision is not correct. That order has become final by the order in revision by the learned Sessions Judge on 7/8/02 and at this point, after half a decade, I am not at all persuaded to invoke the powers under Sec.482 of the Cr.P.C. to consider the challenge against that order which has already become final. There is, it is significant, no challenge raised even in the Crl.M.C. against the said earlier order in revision.

6. Undaunted, the learned counsel for the petitioner submits that the pathway which was allegedly blocked has already been opened and there is no necessity to issue a further direction to remove the obstruction. The petitioner had asserted that there was no pathway and asserted that he has the the right to close the pathway even it is existed; it being only a

private one. In these circumstances, in confirming the conditional order, the Sub Divisional Magistrate had only directed that the pathway must be restored to its original condition. Needless to say that if it has already been restored to its original condition, there can be no question of any further action in execution of Annexure-8 order. That is a contention which the petitioner can raise before the Sub Divisional Magistrate in the course of execution of the order.

7. This Crl.M.C. is, in these circumstances, dismissed with the above observations.

Sd/-

(R. BASANT, JUDGE)

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P.S. to Judge